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No. 94-1208

In the Supreme Court of the United States

OCTOBER TERM, 1994

MERLITA PASCUA SUMMERFIELD, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is a citizen of the United States by virtue of her birth in the Philippine Islands at a time when it was a territory of the United States.

2. Whether Congress had the authority to reclassify the status of persons born in the Philippines when it granted the Philippine Islands independence in 1946.

3. Whether the United States' reclassification of petitioner's status from national to alien violated the Due Process Clause because it was not accompanied by an individualized determination.

4. Whether the United States' reclassification of petitioner's status from national to alien violated the prohibition against bills of attainder.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 37 F.3d 1506 (Table). The opinion of the court of appeals in the companion case of *Rabang* v. *INS* (Pet. App. C1-C39) is reported at 35 F.3d 1449. The decisions of the Board of Immigration Appeals (Pet. App. F1-F9, E2-E3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1994. A petition for rehearing was denied on November 8, 1994. Pet. App. B1. The petition for a writ of certiorari was filed on December 15, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the close of the Spanish-American War on December 10, 1898, Spain ceded to the United States the Philippine Islands, Puerto Rico and Guam. See Treaty of Peace, Dec. 10, 1898, U.S.-Spain, arts. II, III, 30 Stat. 1754, 1755 (ratified Feb. 6, 1899) (Treaty of Paris). Article IX of the Treaty provided that the inhabitants of the Philippines could remain subjects of Spain by making their intention to do so known within one year of the Treaty. 30 Stat. 1759. Otherwise, they were deemed "to have adopted the nationality of the territory in which they * * * reside[d]." *Ibid.* The Treaty declared that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." *Ibid.*; *Rabang* v. *Boyd*, 353 U.S. 427, 429 (1957). The Senate passed a virtually contemporaneous resolution stating that "by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States." 32 Cong. Rec. 1846 (1899).

In 1902, after a period of military rule, Congress enacted the Philippine Government Act, ch. 1369, 32 Stat. 691. That Act provided, in pertinent part, that "inhabitants of the Philippine Islands" and their "children born subsequent" to April 11, 1899, were deemed "citizens of the Philippine Islands and as such entitled to the protection of the United States." § 4, 32 Stat. 692. During that period, citizens of the Philippine Islands were commonly regarded as "nationals" of the United

States. See *Rabang* v. *INS*, Pet. App. C8; *Rabang* v. *Boyd*, 353 U.S. at 429-430.

In 1934, Congress enacted the Philippine Independence Act, ch. 84, 48 Stat. 456 (Independence Act), which provided for complete withdrawal of United States sovereignty ten years after the adoption of a Philippine constitution. § 10(a), 48 Stat. 463. The Independence Act also declared that for immigration purposes the Philippine Islands were to be "considered to be a foreign country" and its citizens were to be treated "as if they were aliens." § 8(a)(4) and (1), 48 Stat. 462. On July 4, 1946, the United States relinquished control over the Philippine Islands and declared them to be an independent sovereign, thus triggering a provision of the Independence Act providing that "the immigration laws of the United States * * * shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." § 14, 48 Stat. 464.

2. Petitioner was born in the Philippines in 1938. Pet. App. A2. She was admitted to the United States as an immigrant in 1982. *Id.* at F1. In 1987, she was charged by the Immigration and Naturalization Service (INS) with being a deportable alien on the ground, *inter alia*, that she had obtained her immigrant visa through fraud involving an invalid marriage. *Id.* at F2. After the immigration judge ordered her deported and denied her request for relief from deportation, petitioner appealed to the Board of Immigration Appeals. *Id.* at F1. The Board upheld the immigration judge's finding that petitioner had obtained her immigrant visa through fraud. *Id.* at F3-F6. The Board rejected as "completely without merit" petitioner's contention that she was a United States citizen by virtue of her birth in the Philippines while it was a territory of the United States. *Id.* at F3.

3. The court of appeals affirmed. Pet. App. A1-A4. Relying on its concurrent decision in *Rabang* v. *INS*, 35 F.3d 1449 (9th Cir. 1994), the court held (Pet. App. A2) that petitioner's birth in the Philippines during the period of United States control was not sufficient to qualify her for citizenship under the Citizenship Clause of the Fourteenth Amendment. The court also rejected petitioner's claims that the United States was without authority to divest her of her status as a "national" or was required by the Due Process Clause to afford her an individualized hearing before doing so. Pet. App. A3. Finally, the court rejected petitioner's contention that the Act that had divested her of her "national" status constituted an unlawful bill of attainder. *Id.* at A4. Judge Pregerson dissented on the first issue, for the reasons set forth in his dissent in *Rabang* v. *INS*, *supra*. Pet. App. A4.

ARGUMENT

The court of appeals correctly held that petitioner, who was born in the Philippines, was not "born * * * in the United States," and therefore did not acquire citizenship at birth by virtue of the Fourteenth Amendment. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.[1]

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[1] After the mandate issued from the court of appeals, petitioner was ordered to report for deportation. See 8 C.F.R. 243.3(a). We are informed by the INS that she did not appear as ordered and is currently a fugitive from justice. Her actions in this regard may "disentitle[] the [petitioner] to call upon the resources of the Court for determination of [her] claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see also *Ortega-Rodriquez* v. *United States*, 113 S. Ct. 1199, 1203-1205 (1993); *Bar-*

1. Petitioner's primary contention (Pet. 3, 13-16, 26-28) is that she is not a deportable alien because she is a United States citizen by operation of the Citizenship Clause of the Fourteenth Amendment, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The court of appeals' holding that petitioner was not born "in the United States" for purposes of the Fourteenth Amendment, and thus was not a citizen, relied upon this Court's decision in *Downes* v. *Bidwell*, 182 U.S. 244 (1901),[2] in which the Court examined the geographic scope of the term "United States" as it is used in the Constitution. In *Downes*, the Court considered whether a special duty on goods imported from Puerto Rico violated the requirement of the Revenue Clause that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. The Court held that the Revenue Clause did not apply to Puerto Rico because Puerto Rico was a territory and thus was not part of the United States. 182 U.S. at 287 (opinion of Brown, J.); *id.* at 342 (White, J., concurring in the judgment). The reasoning of *Downes* applies equally to the Philippines, which were at that time similarly situated. See *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 179-180 (1901).

Levy v. *United States Dep't of Justice*, 990 F.2d 33, 34-36 (2d Cir. 1993).

[2] *Downes* was one of a series of cases involving constitutional questions about newly acquired island territories, collectively referred to as the *Insular Cases*. See also *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Dorr* v. *United States*, 195 U.S. 138 (1904).

The holding of *Downes* was reaffirmed and applied to the Philippines in *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). The Court held in *Hooven & Allison* that the Philippines "are territories belonging to, but not a part of, the Union of states under the Constitution," and thus that imports "brought from the Philippines into the United States * * * are brought from territory, which is not a part of the United States, into the territory of the United States." *Id.* at 673, 674; see also *id.* at 678 ("As we have seen, [the Philippines] are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it.").

A comparison of the Citizenship Clause of the Fourteenth Amendment with other provisions of the Constitution likewise supports the conclusion that the Citizenship Clause does not extend to the Philippines. As Justice Brown noted in *Downes*:

> The Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the States * * *. In short, the Constitution deals with *States*, their people, and their representatives.
>
> The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. * * *
>
> Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that

> "all persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States, and of the *State* wherein they reside." Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place "subject to their jurisdiction."

182 U.S. at 251. Relying on that analysis, the court of appeals held in *Rabang* v. *INS* that because the Citizenship Clause, like the Revenue Clause, contains a territorial limitation, it does not apply. 35 F.3d at 1453; cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990) (reaffirming principle of *Insular Cases* that not every constitutional provision applies wherever the United States exercises its power); *Dorr* v. *United States*, 195 U.S. 138, 149 (1904) (constitutional right to trial by jury not applicable in the Philippines territory). See also *Rabang* v. *Boyd*, 353 U.S. at 432 n.12 ("The inhabitants of the islands acquired by the United States during the late war with Spain, *not being citizens of the United States*, do not possess the right of free entry into the United States.") (emphasis added; citation omitted) .

Petitioner relies (Pet. 5, 16) on three cases to support her contrary position. She concedes (Pet. 4, 28), however that the language in each upon which she relies (and which was also relied upon by Judge Pregerson in his dissent in *Rabang* v. *INS*) constitutes nothing more than dictum. Indeed, none of those cases focused on the question of what is encompassed by the phrase "in the United States" in the Fourteenth Amendment.

In *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), the question before the Court was whether a person born in California of Chinese parents could be excluded under the Chinese Exclusion Acts from the

United States on returning from a visit to China. The Court held that he was a citizen under the Citizenship Clause by virtue of his birth in San Francisco; thus the Court's statement that citizenship was conferred "by birth within the territory," 169 U.S. at 693, meant nothing more than that citizenship is conferred by birth within the particular territory that *constitutes* the United States. Similarly, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873), the Court stated that the Fourteenth Amendment resolved the question of whether "those * * * who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens"; nothing in those cases indicates that the phrase "United States" was intended to extend to overseas territories that were acquired for a limited duration.[3] Petitioner's third case, *Inglis* v. *Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830), was decided before the adoption of the Fourteenth Amendment and has no bearing on its proper interpretation. Thus none of the cases cited by petitioner overcomes this Court's holdings in *Downes*

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[3] Petitioner contends (Pet. 8, 15, 28) that the Philippines are similar to the District of Columbia, which is concededly "in the United States" for purposes of the Citizenship Clause even though not a State. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72-73; *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820). As Justice Brown noted, however, the District is *sui generis* because it "had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. * * * The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. * * * Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government." *Downes*, 182 U.S. at 260-261.

and *Hooven & Allison* that the Philippines were not part of the United States during the period that they were under this Nation's control. Because the Philippines were never "in the United States," petitioner's citizenship is not governed by the Citizenship Clause, and petitioner is not a citizen by birth. See *Rogers* v. *Bellei*, 401 U.S. 815, 827 (1971).

2. Petitioner contends that Congress was without authority initially to classify citizens of the Philippines as "nationals" of the United States (Pet. 8-9, 10-11, 19-20), or to reclassify them as aliens when the Philippines were granted independence (Pet. 4, 5-6, 9-10, 17-18, 23). Petitioner is wrong.

The United States' power to define the status of inhabitants of the Philippines derived from three sources. First, because the formal transfer of the Philippines to the United States was achieved through the Treaty of Paris, the United States' authority derived in part from Article II, § 2, Cl. 2 of the Constitution (the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"), as augmented by the Necessary and Proper Clause, Art. I, § 8, Cl. 18. Article IX of the Treaty provided that the inhabitants of the Philippines would adopt the "nationality of the territory in which they may reside" and that "[t]he civil rights and political status of the native inhabitants * * * shall be determined by the Congress." 30 Stat. 1759.

In addition to the power vested in it by the Treaty of Paris, Congress had independent authority to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States," U.S. Const. Art. IV, § 3, Cl. 2, and "[t]o establish a uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. These

fonts of constitutional authority were sufficient to permit Congress to legislate with regard to a category of persons subject to, and protected by, the sovereignty of the United States, without making them citizens. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972).

Congress did so in the Philippine Government Act, which provided that persons born in the Philippines after 1899 were to "be citizens of the Philippine Islands and as such entitled to the protection of the United States." Ch. 1369, § 4, 32 Stat. 692.[4] Under the Act, Philippine citizens were nationals, rather than aliens, and were not excluded from this country under the general immigration laws. See *Barber* v. *Gonzales*, 347 U.S. 637, 639 (1954). However, in the Independence Act, Congress amended the immigration laws to treat Philippine citizens "as if they were aliens." Ch. 84, § 8(a)(1), 48 Stat. 462. Finally, in 1946, Philippine independence triggered a provision in the Independence Act that provided that "the immigration laws of the United States * * * shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." § 14, 48 Stat. 464.

If petitioner's unmeritorious Citizenship Clause claim is put to one side, there is no question that Congress had the power to reclassify citizens of the Philippine Islands as aliens. "[T]he fallacy in the petitioner's argument is the erroneous assumption that Congress was without

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[4] Petitioner properly does not contend that Congress at any point intended to extend citizenship to the inhabitants of the Philippines. Unlike Puerto Rico, for example, whose inhabitants were granted citizenship by statute, see *Balzac* v. *Porto Rico*, 258 U.S. 298, 307-308 (1922), Congress from the beginning evidenced an intent not to vest citizens of the Philippines with United States citizenship. *Id.* at 308; *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 179-180 (1901).

power to legislate the exclusion of Filipinos in the same manner as 'foreigners.' This Court has held that 'the power to acquire such territory by treaty implies not only the power to govern the territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be.' Congress not only had, but exercised, [that] power to exclude Filipinos." *Rabang* v. *Boyd*, 353 U.S. at 432-433 (citation and ellipses omitted); cf. *Bellei*, 401 U.S. at 834-835. The courts of appeals have consistently followed *Rabang* v. *Boyd* in rejecting the argument that the Independence Act unconstitutionally changed the immigration status of persons born in the Philippines. See, *e.g.*, *Manlangit* v. *INS*, 488 F.2d 1073, 1074 (4th Cir. 1973); *Manguerra* v. *INS*, 390 F.2d 358, 360 (9th Cir. 1968).

3. Petitioner argues (Pet. 10, 12-13, 20-21) that the statutory reclassification of Philippine citizens from nationals to aliens upon Philippine independence was a violation of her right to procedural due process.[5] The substantive decision made by Congress to redefine the rights of an entire class does not require the individual status hearings demanded by petitioner, for "the legislative determination provides all the process that is due." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); see *Atkins* v. *Parker*, 472 U.S. 115, 129-130 (1985). Indeed, it is unclear what petitioner would hope to show at such a hearing. Any claim that a particular Philippine citizen has alternative bases for claiming continuing United States citizenship can be resolved upon application for admission to the United States, or in a deportation proceeding, as happened in petitioner's case. Cf.

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[5] The Due Process Clause extended to the Philippines while it was a United States territory. See *Balzac* v. *Porto Rico*, 258 U.S. 298, 312-313 (1922).

INS v. *Pangilinan*, 486 U.S. 875, 885 (1988) (due process did not require individualized notice of rights for Filipino war veterans who might have been eligible for naturalization).[6]

4. Finally, petitioner argues (Pet. 12, 21-22) that the deprivation of her status as a national of the United States by the Independence Act was a bill of attainder. U.S. Const. Art. I, § 9, Cl. 3. The prohibition against bills of attainder applies only to penal laws. See *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion) ("it has been necessary to determine whether a penal law was involved, because [the prohibition against bills of attainder] appl[ies] only to statutes imposing penalties"). While denaturalization of a United States citizen may be a punishment under certain circumstances, the withdraw of national status from non-United States citizens, and the deportation of such persons, have never been considered punishment. *Id.* at 98-99; see *Flemming* v. *Nestor*, 363 U.S. 603, 616 (1960) ("deportation has been held to be not punishment, but an exercise of the plenary power of Congress to fix the conditions under which aliens are to be permitted to enter and remain in this country"). Because petitioner was never a United States citizen, neither the Independence Act nor the provision of the Immigration and Nationality Act under which she was ordered deported constituted a bill of

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[6] Petitioner also claims (Pet. 23-26) that her reclassification violated the equal protection component of the Fifth Amendment, listing events that she claims evidence discrimination against Filipinos in favor of Japanese, Puerto Ricans, Spaniards, and permanent resident aliens. Even if true, the simple answer is that "there is little question that the [United States] has the power to draw distinctions among aliens based on nationality." *Cuban American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1427 (11th Cir. 1995).

attainder. Cf. *Schellong* v. *INS*, 805 F.2d 655, 662 (7th Cir. 1986); *Linnas* v. *INS*, 790 F.2d 1024, 1029-1030 (2d Cir.), cert. denied, 479 U.S. 995 (1986); *Artukovic* v. *INS*, 693 F.2d 894, 897 (9th Cir. 1982); *Quattrone* v. *Nicolls*, 210 F.2d 513, 519 (1st Cir.), cert. denied, 347 U.S. 976 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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